IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.847 OF 2007
IN
SECOND APPEAL NO.1335 OF 2004

M/s.Union Furniture ...Applicant
vs.
Anandrao G. Kapshilkar
(since deceased through L.Rs.) ...Respondents

Mr.Sanjay Prabhu for the Applicant

CORAM: A.S.OKA,J.
DATE : NOVEMBER 30,2007.

P.C.:

1. Heard Advocate for the Applicant. This application is for bringing on record the legal representatives of the deceased Appellant. Office noting shows that though the notice has been issued, the same could not be served as Bhatta was not paid. Office noting as well as the averments made in the application and the date of filing the application show that the same is filed within stipulated period of limitation provided under the Limitation Act,1963.

2. When applications are made either under Rule 3 or Rule 4 of Order XXII of the Code of Civil Procedure,1908 for bringing on record the legal representatives of the Appellant or the Respondent which are within limitation, normally there is no requirement of issuing notice of such application to the rival party. Such application is to be allowed even without issuing notice to the rival party. In this behalf it will be necessary to refer to Civil Manual issued by this Court. Paragraph 96 of Chapter VII thereof deals with Applications to

bring legal representatives of a deceased defendant on record under Rule 4 of Order XXII of the said Code. Sub paragraphs 2 to 4 of paragraph 96 reads thus :

(2) It shall be the responsibility of the plaintiff to bring on record the correct legal representative of the deceased defendant within the prescribed period of limitation, in the circumstances mentioned in sub-rule (1) of Rule 4 of Order XXII, by making an application upon affidavit proposing the name of the Legal Representative of the deceased defendant to be brought on record.

(3) If the application is made within the prescribed period of limitation, **the court shall order, without issuing any notice to the proposed Legal Representative, that the plaint be amended by adding the Legal Representative as a party to the suit in place of the deceased defendant** and that summons in No.6 referred to above be issued to him. It shall be open to the Legal Representative so added as a party to dispute his character as a Legal Representative when he is served with a summons in Form No.6 referred to above, and the court shall decide the dispute under Rule 5 of Order XXII.

(4) If, however, the application is made after the prescribed period of limitation has expired, notice shall be issued to the proposed Legal Representative before adding him as

a party, calling upon him to show cause why the delay should not be condoned and why he should not be brought on record as a Legal Representative of the deceased defendant and added as a party in place of the deceased defendant. If ultimately he is added as a party to the suit, a summons in Form No.6 referred to above shall, nevertheless, have to be served on him before proceedings with the suit.

(Emphasis added)

Rule 11 of Order XXII provides that Order XXII applies to Appeals and as far as may be, in application of the said order to the Appeals, the word "Plaintiff" shall be held to include an Appellant and the word "defendant" a respondent, and the word "suit" an Appeal. The principle incorporated in the Civil Manual will apply to applications made under Order XXII in first and Second Appeals. The reason for aforesaid legal position is that when application is upon affidavit or is supported on affidavit, if the statements made therein are found to be false or incorrect, the rival party can always raise an objection later on. Therefore, when there is no delay it is not at all necessary to issue notice of the Application.

4. In a given case, the court always has a discretion to issue notice. In view of the settled legal position, though notice is not served, this application deserves to be granted.

5. Application is allowed in terms of prayer clause (a).

JUDGE